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August 24, 2006

Lawrence M. Norton, Esq.
General Counsel
Federal Election Commission
999 E Street NW
Washington, DC 20463

Re: Comments on Advisory Opinion Request 2006-24 (Recounts)

Dear Mr. Norton:

These comments are filed on behalf of Democracy 21 and the Campaign Legal Center in regard to AOR 2006-24, a request filed jointly by the National Republican Senatorial Committee (NRSC), the Democratic Senatorial Campaign Committee (DSCC) and the Republican Federal Committee of Pennsylvania, a state party, seeking permission for those party committees or their federal candidates (Campaigns) to raise non-federal funds for use in recounts or election contests following the 2006 mid-term elections.

There is a history here.

Twice before, party committees have submitted materially similar advisory opinion requests, seeking permission to raise and spend non-federal funds for recount purposes in federal elections.¹

Twice before, the general counsel has recommended that the Commission adopt an opinion that BCRA now requires the committees (and their federal candidates and officeholders) to raise and spend only hard money for recount purposes.²

Twice before, these advisory opinion requests were withdrawn by the party committees at the last minute – after the release of the general counsel's recommendation, and on the eve of the Commission's consideration of the matter – thereby preempting the Commission's vote.³

¹ See AOR 2004-38 (NRSC) (Oct. 13, 2004); AOR 2002-13 (DSCC, DCCC, NRSC, NRCC) (Oct. 30, 2002).

² See Draft AO 2004-38; Agenda Doc. 04-99 (Draft A) (Oct. 26, 2004) available at <http://www.fec.gov/agenda/2004/mtgdoc04-99.pdf>; Draft AO 2002-13; Agenda Doc. 02-79 (Draft A) (Nov. 12, 2002) available at <http://www.fec.gov/agenda/agendas/2002/mtgdoc02-79.pdf>.

³ See In the Matter of AO 2004-38 available at <http://ao.nictusa.com/ao/no/040038.html>; In the Matter of AOR 2002-13 (Nov. 14, 2002) available at <http://ao.nictusa.com/ao/no/020013.html>.

Ironically, the party committees in the current AOR now note that the Commission “has not issued any Advisory Opinions or policy statements regarding the establishment of recount funds...since the enactment of BCRA.” AOR at 3. But they fail to add that the reason there are no prior opinions is because the party committees themselves, when faced twice with adverse recommendations by counsel, blocked the Commission from issuing advice by withdrawing their requests at the eleventh hour.

The Commission has now been asked the same question for a third time since the enactment of BCRA. Nothing has changed. There is no basis for the general counsel to analyze the question differently this time than he has the two times before. And there is no reason for the Commission to depart from the general counsel’s previous analysis and recommendations, should it actually get to vote on the matter this time.

In our discussion below, we emphasize the following conclusions:

First, the Commission has long taken the position that funds spent for recount purposes are “in connection with” a federal election. See 11 C.F.R. §§ 100.91; 100.151. Under 2 U.S.C. § 441(i)(e) – enacted as part of the Bipartisan Campaign Reform Act of 2002 (BCRA) – nonfederal funds cannot be solicited or spent by a federal candidate or officeholder “in connection with” a federal election. Thus, whatever the rule was prior to 2002 on funding recount activities, this provision of BCRA now prohibits federal candidates and officeholders, including the members of the NRSC and DSCC, from soliciting or spending nonfederal funds for a recount of a federal election.

Second, Commission regulations require a state party to spend only federal funds, or allocated federal and nonfederal funds, for all activities “in connection with a Federal election.” 11 C.F.R. § 300.30(b)(3)(iii). Since activities by a state party related to a recount of a federal election are “in connection with” an election, but are not allocable, they must be funded entirely with funds from a Federal account.

Third, in opinions prior to BCRA and in the existing recount regulation, 11 C.F.R. § 100.91, the Commission has erroneously taken the position that recount activities are not “for the purpose of influencing” a federal election, even though they are “in connection with” an election. This interpretation defies common sense, and although not necessary to decide the pending AOR, the Commission should at an appropriate point reconsider its position. Properly construed, and even apart from the new requirements imposed by BCRA, the law requires funds raised and spent for recount activities to be both “contributions” and “expenditures,” and therefore subject to the hard money contribution limits and source prohibitions that apply to both federal candidates and political parties.

1. The application of BCRA to the solicitation of recount funds by federal candidates.

The NRSC and DSCC advisory opinion request can be decided most directly by applying section 441i(e)(1) of BCRA to longstanding Commission precedent on the funding of recounts. Section 441i(e)(1)(A) prohibits a federal candidate (or officeholder) from soliciting or spending nonfederal funds “in connection with” a federal election. The Commission’s precedent

(applying its existing recount regulation at 11 C.F.R. § 100.91) treats recount expenses as funds “in connection with” a federal election. Thus, section 441i(e)(1) of BCRA prohibits federal candidates from raising or spending nonfederal money for recount expenses.

A. Recount funds are “in connection with” an election. The Commission’s longstanding position has been that a federal candidate can raise donations from individuals for recount expenses without those funds being subject to the contribution limits in 2 U.S.C. § 441a. The Commission has, however, treated funds raised for recount purposes as subject to 2 U.S.C. § 441b, which prohibits corporate or union contributions, and to 2 U.S.C. § 441e, which prohibits contributions from foreign nationals.

This position is set forth in a 1977 regulation, 11 C.F.R. § 100.91, which states that money donated “with respect to a recount of the results of a Federal election...is not a contribution except that the prohibitions of 11 C.F.R. 110.20 and part 114 apply.”⁴ Because the corporate ban in section 441b (and in part 114 of the regulations), and the ban on foreign national contributions in section 441e (and in section 110.20 of the regulations), both apply to activities “in connection with” a federal election, the recount regulation is necessarily based on a legal conclusion that recounts are “in connection with” a federal election.

BCRA, however, now provides that a federal candidate or officeholder, or any entity directly or indirectly established, financed, maintained or controlled by a candidate or officeholder, shall not “solicit, receive, direct, transfer, or spend funds *in connection with* an election for Federal office” unless the funds “are subject to the limitations, prohibitions, and reporting requirements of this Act.” 2 U.S.C. § 441i(e)(1)(A) (emphasis added).

Thus, section 441i(e)(1) applies to recount funds. And it applies for reasons that the general counsel’s office set forth at length both in 2004 and in 2002, when this question previously arose.

i. The 2004 AOR.

In October, 2004, the NRSC on behalf of Senate candidate Rep. George Nethercutt, submitted an advisory opinion request regarding the treatment of funds raised for recount purposes. AOR 2004-38 (NRSC) (Oct. 13, 2004). The general counsel prepared two draft Advisory Opinions for consideration by the Commission – Draft A, which concluded that Rep. Nethercutt could *not* raise non-federal funds for recount purposes, and Draft B, which concluded that he could.⁵ The general counsel recommended Draft A.⁶ Two days later, on the date of the

⁴ A comparable provision exempts recount funds from the definition of “expenditure,” again with the proviso that the prohibitions on corporate or union funds, and funds from foreign nationals, apply. 11 C.F.R. § 100.151.

⁵ See Agenda Doc. 04-99 (Oct. 26, 2004) available at <http://www.fec.gov/agenda/2004/mtgdoc04-99.pdf>.

⁶ See *id.*, Cover memorandum at 2 (“OGC recommends Draft A.”)

scheduled Commission meeting, the NRSC withdrew the request, so the Commission never ruled on the matter.⁷

We believe the analysis and conclusion of Draft A, as recommended by the general counsel – that a federal officeholder cannot solicit or spend nonfederal funds for recount purposes – are correct, and should be followed by the Commission in this matter.

Draft A explains that the existing recount regulations, which date back to 1977, are based on the position that while recount funds are not “for the purpose of influencing” a federal election, and thus not subject to section 441a, such funds are “in connection with” a federal election, and thus subject to sections 441b and 441e. Draft A states in regard to the Commission’s existing regulations:

These recount regulations recognize that the Act’s definition of “election” does not specifically include recounts. Nonetheless, these recount regulations expressly bar the receipt or use of funds prohibited by 11 CFR 110.20 (foreign nationals) and Part 114 (corporations, labor organizations, and national banks), thereby implementing the Act’s prohibitions on corporations, labor organizations, national banks and foreign nationals making contributions or expenditures “in connection with” Federal elections. Because these source prohibitions apply to election recount funds under the recount regulations, *those regulations recognize that funds received or spent for recounts of votes cast in Federal elections are funds received or spent “in connection with” these elections under 2 U.S.C. 441b and 441e.*

Agenda Doc. 04-99 (Draft A) at 3 (citations omitted) (emphasis added).

Section 441i(e)(1) of BCRA requires that funds raised and spent by a Federal candidate “in connection with” an election must be subject to all of the prohibitions and limitations of the Act, *including the section 441a contribution limits*. Since the Commission’s existing regulation is based on the conclusion that recount funds are “in connection with” an election, the requirements imposed by BCRA in section 441i(e)(1) necessarily apply to recount funds – and thus the contribution limits in section 441a now – because of BCRA – necessarily apply to such funds as well.

This is precisely the conclusion reached by the general counsel in his recommended draft:

Congress’ choice of the “in connection with” standard in 2 U.S.C. 441i(e)(1)(A) requires the Commission to conclude that section 441i(e)(1)(A) applies to funds raised or spent on recounts of Federal elections. The conclusion flows from the plain language of BCRA, as well as the Commission’s recount regulations dating to 1977 that are premised on the conclusion that recounts are in connection with Federal elections. See 2 U.S.C. 441b(a), 441e(a)(1)(A); 11 CFR 100.91 and

⁷ See Letter of October 28, 2004 from Steve Hoersting to Lawrence M. Norton, available at <http://www.fec.gov/aos/2004/aor2004-38withdrawn.pdf>; see also In the Matter of AO 2004-38 available at <http://ao.nictusa.com/ao/no/040038.html>

100.151. Therefore, candidates and Federal officeholders, their agents, and entities directly or indirectly established, financed, maintained or controlled by or acting on behalf of one or more candidates or Federal officeholders, are prohibited by 2 U.S.C. 441i(e)(a)(A) from soliciting, receiving, directing, transferring, or spending funds for expenses related to participating in a recount of the votes cast in a Federal election unless those funds are subject to the limitations, prohibitions and reporting requirements of the Act.

Id. at 5. Thus, the general counsel concluded that, even though donations to a recount fund would not be considered “contributions” because of the operation of the recount regulation, 11 C.F.R. § 100.91, section 441i(e)(1)(A) of BCRA nonetheless applies to such funds and prohibits a federal candidate or officeholder from receiving or spending any amount in excess of the contribution limits of section 441a. *Id.* at 6.

ii. The 2002 AOR.

On October 30, 2002, one week before the effective date of BCRA, the four congressional campaign committees – the DSCC, DCCC, NRSC and NRCC – all submitted an unusual joint request for an advisory opinion, seeking advice on the impact of BCRA on recount funds. The general counsel prepared two draft opinions for consideration by the Commission at its meeting on November 14, 2002, and publicly released those drafts on November 12, 2002.⁸ The general counsel’s office again recommended the adoption of one of the opinions – Draft A – over the other.⁹ And again, the counsel’s recommended draft advised that a federal officeholder cannot solicit nonfederal funds for recount purposes.

The next day, November 13, 2002, the campaign committees withdrew their AOR, so the Commission never ruled on the matter.¹⁰

The general counsel’s preferred analysis in 2002 was similar to his analysis in 2004, concluding that recount funds must be viewed as “in connection with” a federal election:

These regulations implicitly recognize that while payments for a recount or election contest are not “for the purpose of influencing a Federal election” and therefore such payments are not “contributions” or “expenditures” under the Act, *payments for a recount are “in connection with a Federal election,”* and therefore trigger the prohibitions on being funded by national banks, corporations and labor organizations in 2 U.S.C. 441b and foreign nationals in 2 U.S.C. 441e....

⁸ See Agenda Doc. 02-79 (Nov. 12, 2002) available at <http://www.fec.gov/agenda/agendas/2002/mtgdoc02-79.pdf>

⁹ See Agenda Doc. 02-79, *supra* n.8, Cover memorandum at 1 (“This office would recommend Draft A....”)

¹⁰ See In the Matter of AOR 2002-13 (Nov. 14, 2002) available at <http://ao.nictusa.com/ao/no/020013.html>

The rationale for the Commission's long-standing regulation is revealed by a close examination of the relevant statutory provisions. Contributions that are subject to the 2 U.S.C. 441a limits are by definition funds provided "for the purpose of influencing" a Federal election. Contributions and expenditures that are subject to the 2 U.S.C. 441b prohibitions on corporate or labor organization funds or the 2 U.S.C. 441e prohibition on foreign national funds need only be "in connection with" a Federal election. *Consequently, the Commission concluded that while funds for recount expenses are "in connection with" a Federal election so they cannot include corporate or labor organization funds, they are not "for the purpose of influencing" the election, so they are not subject to the contribution limits or reporting requirements.*

Agenda Doc. 02-79 (Draft A) at 6-7 (emphasis added).

Whatever the situation prior to BCRA, the enactment of section 441i(e) in BCRA now prohibits federal candidates and officeholders from soliciting or spending any non-federal funds "in connection with" an election, and thus, for recount purposes:

Congress's choice of the "in connection with" standard in 2 U.S.C. 441i(e) prohibits a Federal candidate's solicitation, receipt, direction, transfer or disbursement of funds not subject to the limits, prohibitions and reporting requirements of the Act, *even for recounts*. To conclude otherwise, the Commission would have to determine that expenses for recounts are not "in connection with" the Federal election whose results are subject to recount. *The Commission's determination that recount expenses are "in connection with" the relevant Federal election is dictated by the logic and the plain language of BCRA, particularly in light of the Commission's regulation dating back to 1977 that is premised on the conclusion that recounts and election contests are in connection with Federal elections.* Therefore, Federal candidates and officeholders, their agents, and entities directly or indirectly established, financed, maintained or controlled by or acting on behalf of one or more Federal candidates or officeholders, *are prohibited by 2 U.S.C. 441i(e)(1) from soliciting, receiving, directing, transferring, or spending funds for a recount unless those funds are subject to the limitations, prohibitions, and reporting requirements of the Act.*

Id. at 15-16 (emphasis added).¹¹

iii. Analysis

We agree with the analysis and conclusions set forth in the general counsel's preferred

¹¹ The Draft further noted that to the extent the existing regulations are inconsistent with this conclusion, "the Commission intends to reevaluate the continuing viability of these rules in a subsequent rulemaking." Agenda Doc. 02-79 (Draft A) at 16.

“Draft A” documents in both 2002 and 2004, and we urge the Commission to adopt that analysis here.¹²

The alternative analysis set forth in the 2002 and 2004 “Draft B” documents – and both times *disfavored* by the general counsel – is plainly wrong and should be rejected here. That analysis concludes that “recounts are not elections under the Act” and therefore section 441i(e) of BCRA does not apply to recount funds. Agenda Doc. 02-79 (Draft B) at 13; Agenda Doc. 04-99 (Draft B) at 5. Of course, if this is right, then there is no statutory basis for applying sections 441b or 441e to recount funds either, as Commission regulations have long done. Thus, this analysis rejects the approach of the Commission’s longstanding regulation. Further, the logical conclusion of the Draft B analysis is that federal candidates, including publicly financed presidential candidates, could solicit and receive *unlimited corporate and union treasury funds, as well as unlimited donations from foreign nationals*, for recount purposes. This would be an absurd result that is plainly and flagrantly contrary not only to BCRA but to FECA as well.

Both the NRSC and the DSCC are comprised of “sitting” federal officeholders, AOR at 1, so the prohibitions of section 441i(e)(1) apply to the committees. To the extent that the “recount accounts” are established directly by the Senate candidates themselves, *see* AOR at 1, the provisions of section 441i(e) of course apply. According to the AOR, the candidates themselves will “administer” the recount funds and will exercise control over the spending, *id.* at 1-2, so these accounts fall squarely within the scope of section 441i(e)(1).

Given the above, and based on the general counsel’s prior recommended analysis, the Commission should advise that the federal candidate campaign committees and their agents may not raise funds from individuals or PACs in excess of the contribution limits of section 441a, because of the application of section 441i(e)(1). (Question I-1). Nor, for the same reasons, may they administer such funds or control the spending of such funds. (Question I-2). Nor, for the same reasons, may other federal candidates or officeholders solicit funds in excess of the section 441a limits for a recount fund. (Questions I-5 and I-6).

B. Recount funds are “for the purpose of influencing” an election. Even though AOR 2006-24 can be decided on the ground set forth above, in the context of the existing recount regulation, the Commission should, in a future rulemaking, reconsider its precedent, which is based on a view that funds spent for recounts of federal elections are not “for the purpose of influencing” those elections.

¹² The AOR cites and relies on Ad.Ops. 1978-92 and 1998-26, *see* AOR at 3, which of course were both decided before BCRA. To the extent that the analysis of the recount question is now controlled by BCRA, these pre-BCRA advisory opinions are no longer good law, which the general counsel recognized in his prior analyses. *See* Agenda Doc. 04-99 (Draft A) at 7 (“To the extent that Advisory Opinions 1978-92 and 1998-26 are inconsistent with this result, they are superseded with respect to candidates.”); *see also* Agenda Doc. 02-79 (Draft A) at 16 (same). In Ad.Op. 2003-15, also cited by the AOR (at 3-4), the Commission concluded that the activities of a candidate’s legal defense fund were not “in connection with” a federal election, and therefore a candidate’s solicitations for that fund were not subject to section 441i(e)(1). But here, by contrast, the Commission has previously determined that recount activities are “in connection with” federal elections, because that is the basis on which the Commission has long applied the source prohibitions of sections 441b and 441e to recount funds.

The Commission's 1977 regulation is incorrect. Recount funds are, and always should have been treated as, "for the purpose of influencing" a federal election, and thus subject to the contribution limits of section 441a as well as the source prohibitions of sections 441b and 441e. By this analysis, funds spent for recount purposes would be "expenditures" and "contributions" under FECA. Even apart from the operation of section 441i(e) of BCRA, a Senate candidate (and state party) could raise only federally compliant funds for such purposes.

The Commission's position to the contrary simply makes no sense. Indeed, it is difficult to conceive of funds that are more directly "for the purpose of influencing" an election than those funds spent to determine the actual winner of the election. Unlike the redistricting process – which is related to, but not a part of, an election – a recount is an integral part of the election process itself. If a candidate hires an attorney to provide legal oversight to the process of casting and counting ballots in the candidate's election on Election Day, that surely would be considered an "expenditure" by the candidate, to be funded only with hard money by the campaign. Similarly, spending by a candidate on a recount effort to determine who actually won the election should be treated as an "expenditure" by the candidate as well.¹³

It is of course correct that a recount is not, in itself, an "election" as defined in 2 U.S.C. § 431(1). But neither is a television advertisement an "election," or a campaign rally, or a get-out-the-vote drive. Each of these activities is part of the candidate's efforts to influence the outcome of the "election." Precisely the same is true of a recount. The activities paid for by a candidate with regard to a recount are efforts to influence the outcome of an "election," in this case, a general election as defined in section 431(1)(A).

Because funds spent on recount activities are "for the purpose of influencing" an "election," they are by definition "expenditures," and the funds raised by the congressional campaign committees or the state party for such purposes are "contributions." As such, they are subject to the contribution limits and source prohibitions of the Act.

2. The application of FECA to funds raised and spent for recount purposes by a state party.

The Pennsylvania Republican Party separately seeks advice about whether it can raise and spend nonfederal funds for recount activities. The Commission should conclude that it cannot do so.

Existing Commission regulations prohibit a state party from spending nonfederal funds for activities "in connection with" a federal election, unless that spending is allocable. Section 300.30(b)(3)(iii) of the regulations, relating to federal accounts established by state parties, provides:

¹³ The recount process is typically characterized by candidates, their representatives, and party operatives each attempting to ensure a complete count of all "valid" votes, to ensure that "invalid" votes are not counted, and to ensure that the final tally of votes is free from error. Candidates and parties undertake recount activities for the specific purpose of ensuring that the candidate's lead will be protected, or their opponent's lead will be eroded, during the recount process.

All disbursements, contributions, and expenditures made wholly or in part by any State, district or local party organization or committee in connection with a Federal election must be made from either:

- (A) A Federal account, except as permitted by 11 CFR 300.32; or
- (B) A separate allocation account (see paragraph (b)(4) of this section).

11 C.F.R. § 300.30(b)(3) (iii) (emphasis added).¹⁴

What this regulation means is that state party activities “in connection with” a federal election must be paid for either entirely out of a “Federal account” which contains only hard money or, where permissible, out of an allocation account that allocates the disbursements between federal and nonfederal funds. But since the Pennsylvania state party seeks guidance about a recount that is directed solely to recounting a *federal* election, such activity would not be allocable.¹⁵ Thus, because the Commission has long treated recount activities as “in connection with” a federal election, this regulation requires a state party to fund those activities solely out of its “Federal account.”

Accordingly, and based on the general counsel’s prior recommended analysis that recount activities are “in connection with” a federal election, the Commission should advise that the application of section 300.30 means that the State Party may not finance recount activities from funds that are in excess of the contribution limits of section 441a. (Question II-1). The State Party of course is free to raise whatever funds are permitted by state law, but may not use such funds for purposes of federal recount activities. (Questions II-2, II-4).¹⁶

Further, this result is not only legally correct, but logically correct as well. For the reasons discussed above, activity aimed at the recount of a federal election should be considered by the Commission to be “for the purpose of influencing” a federal election, as well as “in connection with” a federal election. As such, the activity would constitute an “expenditure,” and a state party would be required to use only hard money to fund it, just as a state party must use hard money to fund public communications that promote a federal candidate, 2 U.S.C. § 441i(b), expenditures coordinated with a federal candidate, 2 U.S.C. § 441a(d), or contributions to a

¹⁴ Section 300.32 of the regulations, which is referenced in quoted provision, applies to spending by state parties on “federal election activities” and is not relevant here.

¹⁵ See 11 C.F.R. § 106.7(b), which provides that only an expenditure or disbursement by a state party “in connection with both Federal and non-Federal elections” is allocable. This AOR is specifically limited to guidance about a fund to pay recount and similar expenses “resulting from a *Federal* election.” AOR 2006-24 at 1 (emphasis added).

¹⁶ Since the Commission should conclude that neither federal candidates nor the State Party can spend non-federal funds for recount purposes, the question of whether the NRSC and DSCC can “participate in planning and strategy sessions” regarding the use of non-federal funds for recount purposes (Question III-1) is moot.

federal candidate, 2 U.S.C. § 441a(a)(1). All such activities are "for the purpose of influencing" a federal election, and therefore must be funded by state parties exclusively with hard money.

We appreciate the opportunity to comment on this matter.

Sincerely,

/s/Fred Wertheimer

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